considered that it was time that Australian courts took the initiative in making their own creative developments of the inherited common law. He pointed out that, as well as a body of particular rules, Australia inherited the spirit and method of the common law, which were to be used to mould those rules to fit Australian social and economic conditions.[17]

The High Court, with only Menzies J. dissenting, then went on to hold that only moderate damages should be awarded in the circumstances being considered. An earlier House of Lords' case, *Benham v. Gambling*,[18] was followed in preference to *West's* case.[19]

Skelton's case thus completes what *Parker's* case started in reversing the *Piro v. Foster and Co. Ltd.* approach to decisions of the House of Lords as authority in Australia. The High Court is now more independent than ever before, and it has attained this position by its own initiative. The right to appeal to the Privy Council from decisions of the Court is the last remaining bar to its full maturity.

G. A. CALCUTT*

NAGLE v. FEILDEN

Common law protection of the right to work at one's chosen occupation.

Progress made in developing protection for a man's right of work is to be seen in *Nagle v. Feilden*,[1] a recent decision of the Court of Appeal. The direct application of the case is to the right to membership of a body which has absolute control of employment in a trade or profession.

In the United Kingdom horse-racing on the flat is under the complete control of the Jockey Club. All trainers must hold a Jockey Club licence, and any horse trained by someone other than a licensed trainer would not be permitted to run at a race-meeting under the Club's control. The invariable practice of the Jockey Club had been not to license women as trainers, and accordingly Mrs. Nagle's appli-

17 Id. at 496-7.

18 [1941] A.C. 157.

19 For a note on the effect of the decision on the law relating to damages, see (1966) 29 M.L.R. 570.

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1 [1966] 1 All E.R. 689; [1966] 2 W.L.R. 1027.

cation for a licence was refused. In fact, as the Jockey Club well knew, Mrs. Nagle had been training race-horses since 1938, the licence for her stables being held formally by her head-lad. It was not disputed that the true reason for refusing her a licence was simply that she was a woman. Mrs. Nagle sued the three defendants, who were all Stewards of the Jockey Club, both personally and on behalf of all the Stewards and members of the Jockey Club. She sought a declaration that the practice of refusing licences to women was against public policy, a prohibitory injunction restraining the Stewards from following that practice, and a mandatory injunction ordering the Stewards to grant her a licence. An interlocutory order was made, and affirmed on appeal to a single Judge of the Supreme Court, striking out her statement of claim as disclosing no cause of action. Mrs. Nagle asked the Court of Appeal to quash this order.

As in the lower court, counsel at first thought it necessary to seek to show a contractual relationship between the Stewards of the Jockey Club and Mrs. Nagle, for it had been said that the power of the courts to intervene in such cases is derived from its jurisdiction to protect contractual rights.[2] Accepting this premise, counsel tried to show a contract in two ways: first, that the Stewards made an offer to the world at large that they would consider applications from trainers for licenses, and that Mrs. Nagle accepted such offer by applying for a licence; second, that they contracted with the head-lad not personally but in his capacity as agent for Mrs. Nagle. However, the Court unanimously rejected the argument that there was any such contract, saying that there was no such offer as that alleged, only an invitation to treat, and the contract with the head-lad was not with him as agent, because the Stewards declined to contract with Mrs. Nagle, and she knew this.

The action succeeded, however, because the Jockey Club was under a duty[3] to all persons interested and concerned in racing to exercise its control lawfully and reasonably and not to exercise capriciously any discretion vested in it under the rules. Great emphasis was placed on the fact that the Jockey Club had a complete monopoly over racing and could put a man effectively out of business. This fact differentiated it from a social club, where it would be necessary to show a

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2 Lee v. Showmen's Guild, [1952] 2 Q.B. 329.

3 The possibility of founding jurisdiction in tort has not been fully canvassed, except, perhaps, in Abbott v. Sullivan, [1952] 1 K.B. 189, and Orchard v. Tunney, [1957] S.C.R. 436. This omission has been criticised by Lloyd, *The Right To Work,* (1957) 10 CURRENT LEGAL PROBLEMS 32.

contract before there could be a basis of control by the courts; thus the dictum of Bayley J. in *R. v. Lincoln's Inn Benchers*[4] was questioned and disapproved in so far as it suggested that a trading or professional society was like a social club in this respect. The Court of Appeal was unanimously of the opinion that the practice of refusing women licences was arbitrary and capricious and contrary to public policy. Where those who have the control of a trade or profession make a rule which enables them to exclude a person from his work arbitrarily or capriciously, not reasonably, that rule is bad as against public policy. For this proposition the cases of *Weinberger v. Inglis*[5] and *Faramus v. Film Artistes' Association*[6] were cited.

The *locus standi* of the applicant, then, was derived from the infringement of public policy by a body which completely controlled a particular trade. Thus Danckwerts L.J. said:

> This cases seems . . . to involve matters of public policy . . . . The law relating to public policy cannot remain immutable. It must change with the passage of time . . . . In my opinion, the courts have the right to protect the right of a person to work when it is being prevented by the dictatorial exercise of powers by a body which holds a monopoly.[7]

Salmon L.J. was evidently of the same opinion, for he said:

> I should be sorry to think that we have grown so supine that today the courts are powerless to protect a man against unreasonable restraint on his right to work to which he has in no way agreed and which a group with no authority save that which it has conferred upon itself seeks capricously to impose on him.[8]

The Master of the Rolls, Lord Denning, pointed out how in similar cases in the past the courts had bestowed jurisdiction upon themselves by finding a fictitious contract, and he said:

> The true ground of jurisdiction in all these cases is a man's right to work. I have said before . . . that a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work.[9]

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4 (1825) 4 B. & C. 855, 859-60.
5 [1919] A.C. 606.
6 [1964] 1 All E.R. 25 (H.L.), affirming [1963] 1 All E.R. 636 (C.A.).
7 [1966] 1 All E.R. 689, 696-7.
8 Id. at 700.
9 Id. at 694.

This position of the Court of Appeal is a definite step forward from the previous position. Originally it had been thought that the only reason for the courts to intervene in the decisions of voluntary associations (usually to prevent wrongful expulsion) was to protect the member's property rights—his interest in the funds of the society.[10] This view was so prevalent that in one case[11] intervention was refused because, the expulsion being from a proprietary club,[12] no rights of property were affected. However, in *Russell v. Duke of Norfolk*[13] in 1949 contractual rights were treated as supplying a basis for intervention in the affairs of domestic tribunals, a basis which was followed in *Abbott v. Sullivan*[14] and which soon became well established.[15] Even this basis of intervention, however, raised difficulties; for instance, a contract often had to be implied, and this might not be able to be done without a fiction.[16] It has also been said[17] that the insistence of the courts upon the observance of the requirements of natural justice[18] contains a logical difficulty, if jurisdiction is founded on contract, because there may be no provision in the rules requiring natural justice or, *a fortiori,* there may be a provision purporting to exclude its principles. This point had been met openly by Lord Denning in *Lee v. Showmen's Guild,*[19] when he said that the rules of natural justice were implied into the rules of domestic tribunals as a matter of public policy, not of contract. All these developments had the effect of better protecting a man's right to work, and it should be obvious that *Nagle v. Feilden* represents a further step along this road, affording protection before any contractual rights spring into existence. As such, it seems to give the right to work a judicial stature it had not previously attained.[20] But it is important to remember that

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10 See Forbes v. Eden, L.R. 1 H.L. (Sc.) 568; Rigby v. Connol, 14 Ch. D. 482.

11 Baird v. Wells, (1890) 44 Ch. D. 661.

12 i.e. in the sense that all the club's property belonged not to the members as partners, nor to trustees upon trust for the members, but to one member personally.

13 [1949] 1 All E.R. 109.

14 [1952] 1 K.B. 189.

15 See, e.g., Lee v. Showmen's Guild, [1952] 2 Q.B. 329.

16 See Abbott v. Sullivan, [1952] 1 K.B. 189, and Davis v. Carew-Pole, [1956] 2 All E.R. 524, as explained in Byrne v. Kinematograph Renters' Society Ltd., [1958] 2 All E.R. 579, 594-97.

17 WEDDERBURN, THE WORKER AND THE LAW 325 (Penguin, 1965).

18 Annamunthodo v. Oilfield Workers' Trade Union, [1961] 3 All E.R. 621 (P.C.); Lawlor v. Post Office Workers' Union, [1965] 1 All E.R. 353.

19 [1952] 2 Q.B. 329, 342.

20 See, e.g., how this point was expressly left undecided in Bott v. Napier W.W.I.U., [1934] N.Z.L.R. 993, *per* Myers C.J. at 1001 and *per* Kennedy J.

such a remedy is only available against a body which has a monopoly control of employment in some field—a trade union[21] operating a closed shop would be a good example—and not to merely social clubs.

The decision is not only interesting because of this new basis of intervention, but also because, once a basis of intervention has been found, the substantive control which the court will exercise seems wider than in the past. The Court of Appeal said that the discretion of the Stewards to control the right to work would be supervised by the courts if it were exercised arbitrarily or capriciously. At first sight, this seems to echo the standard that the House of Lords had adopted in *Weinberger v. Inglis.*[22] In that case the plaintiff sought his annual re-admission to the Stock Exchange, but he was turned down because of his Austrian birth, even though he had been a naturalised British subject for over twenty years; anti-Axis feeling was apparently running fantastically high in London in 1917. It was said by Lord Atkinson that the power to re-elect was a fiduciary power and must be exercised bona fide. As in the case of the directors of a public company refusing to consent to a transfer of shares, the only way of invalidating the exercise of the power was to show that it had been exercised mala fide. One way of showing this might be to show that it had been exercised arbitrarily and capriciously, but this was not exactly decided since it was held that the power had been exercised bona fide. The implication seems to be that even an arbitrary and capricious exercise of the power could nevertheless be bona fide. Whether this is a correct interpretation or not, Lord Denning undoubtedly goes much further in *Nagle v. Feilden,* for he seems to

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at 1002. A note by Rideout, (1966) 29 M.L.R. 424, 426, is misleading on this point.

In Tierney v. Amalgamated Society of Woodworkers, [1959] I.R. 254, a carpenter sought admission to a union which operated a closed shop in his trade. His application was refused, and he was denied judicial relief because, as he had no contractual or property rights, he had no *locus standi.* The right to work, it was said, was one acquired only by membership, and in the choosing of new members a trade union had the same discretion as any other voluntary organisation. In reaching its decision the Court followed Maclean v. The Workers' Union, [1929] 1 Ch. 602, even though Denning L.J. had not done so in Lee v. Showmen's Guild, [1952] 2 Q.B. 629. The case seems indistinguishable from Nagle v. Feilden, but was not, it seems, cited in argument.

21 The right to membership of a registered trade union is already guaranteed in Australia by s. 144 Conciliation and Arbitration Act 1904-66 (Commonwealth), and most of the States have parallel legislative provisions, where relevant: see, e.g., s. 9B (5) Industrial Arbitration Act 1912-66 (W.A.).

22 [1919] A.C. 606.

equate acting unreasonably with acting arbitrarily or capriciously which, in turn, he assumes to justify intervention:

> It seems to me that this unwritten rule [that women will not be granted licences to train horses] may well be said to be arbitrary and capricious. It is not as if the training of horses could be regarded as an unsuitable occupation for a woman, like that of a jockey or a speedway-rider. It is an occupation in which women can and do engage most successfully. It may not be a "vocation" within the Sex Disqualification (Removal) Act 1919, but still it is an occupation which women can do as well as men, and there would appear to be no reason why they should be excluded from it.[23]

This formulation seems to impose much more onerous standards upon those controlling admission to a closed shop than had previously been the case.[24] In doing so, the case may have achieved in a different manner what Lord Denning himself had unsuccessfully sought to achieve three years earlier in *Faramus v. Film Artistes' Association.*[25] In that case he had sought to invalidate a very restrictive rule[26] concerning eligibility for membership of a union which operated a completely effective closed shop on the grounds that it was unreasonable, and that trade union rules, like by-laws, must be reasonable to be valid.[27] But the other members of the Court of Appeal, Upjohn and Diplock L.J.J., and the House of Lords pointed out that this rule regarding by-laws[28] is only part of the doctrine of ultra vires, and does not apply to trade union rules. They agreed, however, that the rule in question was unreasonable as being in restraint of trade, and it would have been invalidated but for the shield it was given by section 3 of the Trade Union Act 1871.

In Australia, however, trade union activity is probably not the area in which the case will have its main importance, for membership of trade unions is for the most part controlled by statute.[29] Much more

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23 [1966] 1 All E.R. 689, 695.

24 See n. 20, above.

25 [1963] 1 All E.R. 636.

26 'No person who has been convicted in a court of law of a criminal offence (other than a motoring offence not punishable by imprisonment) shall be eligible for, or retain membership in the association.'
The appellant had been convicted by a Nazi court in occupied Jersey of being in possession of a propaganda leaflet, and also, when he was seventeen, of taking away a car without the owner's consent.

27 [1963] 1 All E.R. 636, 641-2.

28 Set out in Kruse v. Johnson, [1898] 2 Q.B. 91.

29 See n. 21, above.

significant is likely to be its application to those bodies, such as the Stock Exchanges, Turf Clubs, Boxing and Football Associations, which have exclusive control over entry to a trade or profession and which are not, in turn, controlled by statute. It will be interesting to see whether the 100% monopoly control is insisted upon or whether the decision may come to be applied to bodies exercising only substantial control over entry to a trade or profession.

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